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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 348

BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY AND THE AMERICAN TOBACCO COMPANY,

Petitioners,

v.

HOLLAND LINES LIMITED, respondent and claimant of the S.S. "ANCHISES", her engines, boilers, etc., and West of England Shipowners Protection & Indemnity Association, Limited,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY and THE AMERICAN TOBACCO COMPANY,

Petitioners,

v.

HELLENIC LINES LIMITED, respondent and claimant of the S. S. "ANGHYRA", her engines, boilers, etc., and WEST OF ENGLAND STEAMSHIP OWNERS PROTECTION & INDEMNITY ASSOCIATION, LIMITED,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

1. Reply to Respondents' Point (a)—page 8 of their brief—Management

Respondents argue that because the immediate objective of shutting off the dynamo was not solely for the preservation of the cargo, the action taken constituted an error in management of the vessel—not negligence in the care of the cargo. They contend that the immediate object of doing an act always controls and that the cases cited by petitioners deal with acts related solely to the care of cargo, having nothing to

do with navigation or management of a vessel. That such assertions are incorrect is clear from the cases themselves. For example:

In *Gosse Millerd Ld.* v. *Canadian Govt. Merchant Marine* (1929) A.C. 223, the master left the hatches open to afford repairmen access to the holds to repair collision damage. Rain entered and damaged the cargo. The Court of Appeal, applying the test respondents suggest, held that the purpose of leaving the hatches open—for repairs—was an act of management, and exonerated the carrier. The House of Lords reversed, holding that the act of omission to keep the hatches or cargo covered was controlling and constituted negligence in care of cargo. (pet. 14, 15)

In *Foremans and Ellams Ld.* v. *Federal Steam Navigation Co.*, (1928) 2 K.B. 424; the engineer shut down one of the two refrigerating machines; his object was to use the steam the machine would have required to propel the ship, a matter of ship's management or navigation; the Kings Bench held that the act of omission to operate the second refrigeration machine was controlling and constituted negligence in care of cargo. (pet. 15)

In *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.* (E.D. Mich) 32 F. Supp. 520, the object of the officers in allowing water to remain in a fresh water line was to serve the crew, a matter of ship's management. The Court held the act of omission, in failing to turn off the line during freezing weather, resulting in damage to cargo, was controlling and constituted negligence in care of cargo. (pet. 14)

In *The Vallescura*, 293 U.S. 296, the object of closing the hatches and ventilators was to protect

the ship and her cargo during heavy weather; this Court; the Court of Appeals and the District Court agreed that the omission to reopen them to ventilate the cargo during fair weather was not an error in management or navigation but negligence in the care of the cargo. (pet. 12)

In *The Jean Bart*, 197 Fed. 1002, 1006 (D.C.), the captain kept the ventilators and hatches closed during long periods. His object was to protect the ship and her cargo during heavy weather. The Court held that the failure to properly use the ventilating equipment during good weather related to the cargo and was not an error in management or navigation. (approved in *The Vallescura*, pet. 12)

In *The Naples Maru*, 106 F. 2d 32 (2 Cir), the captain did not use the cowls of the ventilators but only the stumps. His object in doing so during periods of heavy gales was to protect both the ship and her cargo. As to other periods he claimed the weather was always threatening. The Court held that his act of omission in failing to replace the cowls when the weather permitted constituted negligence in care of cargo. (pet. 14)

In *The New York*, 29 F. 2d 26 (2 Cir.), the Court said:

> "Negligence relating to ventilating perishable cargo is a fault relating to the cargo alone, Skipton Castle, 243 Fed. 523 * * *" (pet. 13, 14)

Respondents discuss none of these authorities, except *The Vallescura* and *The Naples Maru*.

Instead they rely on *Bernstein Co.* v. *M S Titania*, 1955 A.M.C. 2040, aff'd. 232 F. 2d 771 (C.A. 5), which involved simply a ballasting operation. Errors in

such operations are uniformly held to constitute errors in management of the ship.

Respondents further rely on *Ravenscroft* v. *United States*, 88 F. 2d 418 (C.A. 2) cert. den. 301 U.S. 707, which involved a vessel under way. In the course of a series of catastrophies an additional instrumentality having nothing to do with cargo was brought into action, namely a fire hose and water, to avoid "what seemed to be impending disaster from fire". Under such circumstances the object of the wetting of the cotton cargo was held to be an act of management of the vessel.

Respondents further cite *The Germanic*, 196 U.S. 589 (1904). The Court held that the error in correcting the list of the ship during discharge of cargo was not an error in ship's management but negligence in care of cargo. In an opinion twenty-nine years later interpreting the same statute, in *The Vallescura*, supra, the Court held on the basis of *The Germanic*, supra, *Knott* v. *Botany Mills*, 179 U.S. 69, 73, 74 and *The Jean Bart*, supra, that omitting to ventilate cargo is not an error in management of the vessel but in care of cargo. The court in *The Jean Bart* had stated that its holding "upon principle finds support in *Knott* v. *Botany Mills* * * * (and) *The Germanic* * * *" (A 19). In *The Jean Bart*, supra, the court grounded its decision not on the statement in *The Germanic* as to "the primary nature and objects of the acts which cause the loss" but on the duty of the ship's officers and the purpose to which the duty relates. (A 19) *The Jean Bart* was adopted by this Court in *The Vallescura* as its sole ventilation authority.

2. Reply to Respondents' Point (b)—page 11 of their brief—Inferences

Respondents contend that Rule 52(a) of the Rules of Civil Procedure is primarily intended to protect only a finding made from conflicting testimony given in open court.

The decisions of this Court cited by respondents do not so hold. The cases cited at pages 20-25 of our petition establish the contrary. The "Notes of Advisory Committee on Rules" states that the rule applies to both uncontradicted and conflicting testimony. (Fed. Rules Civ. Proc., rule 52a, 28 U.S.C.A. page 15 of volume covering rules 52-58) The other authorities relied upon by respondents either support petitioners' position or are not opposed to it; or at most they emphasize the conflict of decision between the circuits.

The most that can be said of any of the Court of Appeals decisions cited by respondents is that a few state that findings of basic facts cannot be set aside unless clearly erroneous but that findings of ultimate facts founded upon such basic facts may be set aside even though not clearly erroneous. In the case at bar, the District Court's finding—"The British Admiralty did not order that the dynamo be cut off" (A 17) was a statement of a basic fact, not of ultimate fact; not only was it in substance what the captain said—"That was not orders to shut off the dynamos. * * * I decided myself" (A.A 86a, 88a) but it was almost precisely the form in which respondents' counsel summarized it on the trial record—"they did not order him to do so." (A 301)

Respondents' counsel have cited no authority to justify the reversal of a District Court finding of a basic fact founded on undisputed testimony in a deposition.

3. Reply to Respondents' Point (c)—page 17 of their brief—Stowage

Respondents argue that the District Judge did not leave the issue of stowage undecided, but in fact found that the cargo was stowed in accordance with the custom and usage in the trade. They ignore their own assignment of error, reading:

> "14. In that the Court failed to find and hold explicitly that at the inception of the voyage the stowage of the tobacco was proper for the voyage via Suez." (A 49)

4. Reply to Respondents' Point (d)—page 18 of their brief—General Average

Respondents argue that there is no evidence that any tobacco was sacrificed during the blackout periods. The District Court found on the evidence of the experts of both sides that "the conditions brought about by reason of the cessation of the night ventilation at least planted the seeds of damage". (A 17) This finding was not disturbed by the Court of Appeals.

CONCLUSION

Respondents have shown no sound reasons for rejecting the petition. For the reasons summarized at pages 35 to 38 of our petition, the petition should be granted.

Respectfully submitted,

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